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SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

October Term 1965
No. 1028

Office-Supreme Court, U.S.
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LOUIS LESSER, *et al.*,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## Petitioners' Reply to Memorandum of Respondent in Opposition.

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## Petitioners' Reply to Memorandum of Respondent in Opposition.

### I.

### Respondent Grossly Misrepresents the Findings.

1. The Tax Court found [R. p. 18]:

> "The Helipot building *as originally designed and constructed* was usable for a variety of light manufacturing purposes and was not a one-purpose building." (Italics supplied.)

Nowhere is there a corresponding finding as to the building as reconstructed by the lessee under the terms of the lease.

The sentence which respondent quotes, which says that "the property was not a unique, single-purpose building" (Br. p. 4), is taken from the Tax Court's subsequent opinion. [R. p. 33.] It clearly relates to the finding above quoted. It cannot, by any conceivable in-

terpretation, relate to any other part of the findings. Nor can it by any possibility have been intended as a separate and additional finding relating to the building as reconstructed. If the Tax Court had meant this it could very easily have said so.

2. Respondent's own discussion shows that he, too, is speaking only of the building as originally designed and constructed. He says (Br. p. 5) that there is no basis "for petitioners' contention that the Tax Court . . . must state the formula used in reaching its conclusion, showing a detailed break-down of the components and the estimated useful life of each." Petitioners made no such contention; but more important, there was no evidence of that character relating to the building as reconstructed. Respondent's discussion on this is but a further attempt by him to color the building as reconstructed with the character of the building as originally designed and constructed.

3. Respondent cites *Helvering v. National Grocery Co.*, 304 U.S. 282, 295, for the proposition that the Tax Court "may decline to accept expert testimony at face value." In the cited case, as this Court's opinion there shows in detail, pages 291-295, there was considerable evidence contradicting the expert testimony introduced. Here the expert testimony was absolutely unrebutted and unchallenged by any evidence. Still more important, that testimony as to the character of the building as reconstructed was not even questioned by a single word in the Tax Court's findings or opinion. The Tax Court just ignored it. What it did in effect was to determine the life of the building being depreciated by a building which was not even in existence during the period under review.

4. In reference to petitioners' contention of a conflict with *Spinks Realty Co. v. Commissioner,* 62 F. 2d 860 (C.A.D.C.), respondent says that "petitioners purchased and leased their building not on the condition that it be demolished, but with the understanding that it be improved." This is clearly contrary to the findings; the building was reconstructed but there is nothing to show that it was or had to be "improved," and certainly not in the sense which would be relevant here, lengthening the building's useful life. In this again respondent is trying to impute to the building as reconstructed the character of the building as originally designed and constructed.

## II.

## The Conflicts Are Clear and the Issues Involved Are of Great Importance.

Viewing the findings as they are, not as respondent has carefully misrepresented them, we again contend that the decision below is, as shown in our petition, in clear conflict with decisions of other circuits. We say in addition now that the issues presented are of the highest importance. Depreciation is an important factor in a large percentage of returns. We quote from 4 Mertens §23.01:

> "The scope of the subject may be readily appreciated when it is realized that in certain years total depreciation deductions have been larger than the total taxable net incomes of all corporations."

Certainly then the confusion which will necessarily result from each of the conflicts shown in the petition is a matter of great importance.

## III.

### Petitioners Seek Here Only a Remand to the Tax Court for Findings and Decision Based on the Building as Reconstructed.

Petitioners are not asking this court for a reversal of the Tax Court's decision. They seek only a remand to that court for findings based on the building as reconstructed, the building actually in existence during the year involved, and decision in conformity with such findings.

### Conclusion.

In conclusion we submit again that the decision below should be reviewed by this Court.

Respectfully submitted,

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